LIM TEE HIN

v.

LEDCHUMANAN NAGAPPAN

HIGH COURT MALAYA, SEREMBAN
LOW HOP BING J
[ORIGINATING SUMMONS: 25-27-1999]
21 JUNE 2004

LAND LAW: *Caveats - Compensation for wrongful caveats - Whether registrar's assessment of damages correctly made - Whether losses incurred were a direct consequence of the entry of wrongful caveats - National Land Code, s. 329*

This was an appeal by the defendant against the registrar's assessment of damages under s. 329(1) of the National Land Code. The assessment of damages was ordered by the learned judge after he set aside private caveats lodged by the defendant against a property ('the property') purchased by the plaintiff. The damages ordered in favour of the plaintiff were: (1) for bank interest amounting to RM20,358.52 for the delay caused by the entry of the wrongful caveats in completing the purchase of the property; (2) for company interest amounting to RM47,101.37 for a loan taken with Pembinaan Purcon Sdn Bhd ('Purcon') for the purchase of the property; and (3) legal fees amounting to RM27,042.90 incurred by the plaintiff for removing the defendant's private caveats.

The issues *inter alia* were: (1) whether the plaintiff's claim for damages resulted from the plaintiff's impecuniousness and therefore irrecoverable; (2) whether the bank interest was irrecoverable as it was not paid by the plaintiff but by Purcon; and (3) whether the company interest was in breach of ss. 3 and 15 of the Moneylenders Act 1951 and therefore unenforceable.

Held (dismissing the appeal):

[1] The purchase of the property could not be completed within the time stipulated due to the defendant's private caveats. The plaintiff obtained an extension of time from the court to overcome this difficulty and also to avoid the forfeiture of RM98,000 that the plaintiff paid as deposit for the purchase of the property. With the extension of time granted by the court, the plaintiff had to pay the bank interest. Therefore, there was no question of the plaintiff's impecuniousness as the whole situation was brought about by the defendant's private caveats. In fact, there was evidence that the

plaintiff had mitigated this loss. Further, whilst it was true that the bank interest had been paid by Purcon on behalf of the plaintiff, it did not alter the fact that the plaintiff eventually had to repay Purcon the sum paid. (pp 292 f-h & 293 a)

[2] The defendant's wrongful entry of the private caveats had resulted in the plaintiff having to take a loan of RM700,000 from Purcon in order to complete the payment of the purchase price for the property. The defendant had no locus standi to raise the issue that the interest of RM47,101.37 for the said loan was in breach of ss. 3 and 15 of the Moneylenders Act 1951 as he was not a privy to the loan transaction. (pp 293 c & 294 b)

[3] On the authority of *Lo Foi v. Lee Ah Hong & Ors*, the plaintiff was entitled to the legal fees incurred to get the defendant's private caveats removed. (p 294 g)

[4] Notwithstanding the fact that the damage or loss had been paid by Purcon on behalf of the plaintiff, it was the payment of the plaintiff through Purcon. The maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself) was applicable. (p 295 a)

[5] The plaintiff had discharged the burden of proving real and actual loss in his claim for damages, ie losses of his own money which were reasonably foreseeable and were a direct consequence of the private caveats lodged by the defendant. (p 296 a)

Case(s) referred to:

Adnan Hj Mat Jidin & Anor v. Irwan Wee Abdullah & Anor [1997] 3 CLJ 181 CA ***(refd)***

Baju Ria v. Liau Kim Lian [1965] 1 MLJ 128 ***(refd)***

Cheng Chin Chong v. Shak Heng & Sons Sdn Bhd [1981] CLJ 91; [1981] CLJ (Rep) 126 HC ***(refd)***

Coke & Coal Products (M) Sdn Bhd v. Hon Swee Kong & Ors [2000] 1 CLJ 19 HC ***(refd)***

Dan Sin Wah v. Chan Hai Swee [1951] 17 MLJ 189 ***(refd)***

Jayasankaran v. PP [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 FC ***(refd)***

Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 ***(refd)***

Larut Matang Supermarket Sdn Bhd v. Liew Fook Yung [1995] 1 MLJ 375 ***(refd)***

Lo Foi v. Lee Ah Hong & Ors [1998] 1 CLJ Supp 244 HC ***(refd)***

Mawar Biru Sdn Bhd v. Lim Kai Chew [1992] 1 MLJ 336 ***(refd)***

Minty Holdings Sdn Bhd v. JB Properties Sdn Bhd (SK Brothers Realty, Third Party) [1998] 7 MLJ 182 ***(refd)***

Ngui Mui Khin & Anor v. Gillespie Bros & Co Ltd [1980] 2 MLJ 9 ***(refd)***

Ong Eng Chai v. China Insurance Co Ltd [1974] 1 MLJ 82 ***(refd)***

Owners of Dredger Liesbosch v. Owners of Steamship Edison [1933] AC 449 ***(refd)***
The Owners of The Ship or Vessel Mt 'Rowan" v. The Owners of The Ship or Vessel or Property 'Singapura Timur [2003] 2 CLJ 736 HC ***(refd)***
Quill Construction Sdn Bhd v. Tan Hor Teng & Anor [2003] 7 CLJ 24 HC ***(refd)***
Yeep Mooi v. Chu Chin Chua & Ors [1981] 1 MLJ 14 ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 307(iv)
Moneylenders Act 1951, ss. 3, 2A(1)(h), 15
National Land Code, ss. 322(2), 327, 329(1)
Rules of the High Court 1980, O. 14

For the plaintiff - Dheema Ariyapala (Adrin Adzuan Mohd Daud); M/s Dheema Adrin & Co
For the defendant - I.N. Jeganathan (KF Yoong); M/s K.F. Yoong & Co

Reported by Usha Thiagarajah

JUDGMENT

Low Hop Bing J:

Appeal

This is an appeal in encl. (35) filed by the defendant against the decision of the learned registrar who on 19 September 2003 awarded the following heads of damages in favour of the plaintiff:

1. Interest amounting to RM20,358.52 paid by the plaintiff to his bank ("bank interest");

2. Interest amounting to RM47,101.37 paid by the plaintiff to Pembinaan Purcon Sdn Bhd ("company interest"); and

3. Legal fees amounting to RM27,042.90 paid by the plaintiff to his solicitors ("legal fees").

Factual Background

On 10 December 1998, the private caveats lodged by the defendant were set aside by the learned judge who also ordered that damages be assessed and paid by the plaintiff to the defendant, *inter alia*, in the following terms:

(iii) bahawa Responden kena membayar gantirugi kepada Pemohon akibat salah kaveatnya ke atas hartanah tersebut yang akan ditaksirkan kelak;

(iv) bahawa segala kos bagi permohonan dan kos sampingan baginya boleh dibayar dan ditanggung oleh pihak Responden.

[My translation:

(iii) that the Respondent do pay damages to the applicant consequent upon the wrongful caveat on the said property, to be assessed;

(iv) that all costs of the application and ancilliary costs are payable and to be borne by the Respondent]

The applicant is the plaintiff while the respondent is the defendant.

Submission For Defendant

En. I.N. Jeganathan and En. K.F. Yoong, both learned counsel for the defendant, submitted that the plaintiff is only entitled to claim loss of his own money or loss of use of his own money resulting from the wrongful caveats. Reliance was placed on ss. 329(1) and 322(2) of the National Land Code 1965; *Mawar Biru Sdn Bhd v. Lim Kai Chew* [1992] 1 MLJ 336 HC; and *Coke & Coal Products (M) Sdn Bhd v. Hon Swee Kong & Ors* [2000] 1 CLJ 19 HC.

A reference hereinafter to a section shall, unless a contrary intention appears, be a reference to that section in the National Land Code 1965.

They added that damages resulting from the plaintiff's impecuniosity are not recoverable, citing Owners of *Dredger Liesbosch v. Owners of Steamship Edison* [1933] AC 449 HL, and that the onus is on the plaintiff to show the damage or loss.

In respect of the bank interest, it was contended for the defendant that the plaintiff has admitted that this interest was paid by Pembinaan Purcon Sdn Bhd ("Purcon") *vide* Purcon's cheque and not by the plaintiff and there was no evidence to show that the plaintiff has repaid the money to Purcon.

It was then stressed for the defendant that the plaintiff has not shown in the evidence relating to the company interest amounting to RM47,101.37 for the loan of RM700,000 from Purcon to pay the balance of the purchase price for the property.

Further, they canvassed that the interest for the loan is in breach of ss. 3 and 15 of the Moneylenders Act 1951 (Act 400) and so unenforceable by Purcon against the plaintiff and irrecoverable by the plaintiff against the defendant.

On the legal fees, it was submitted for the defendant that they were paid by Purcon, and that the order for assessment of damages did not provide for costs on a solicitor and client basis, seeking support in *Minty Holdings Sdn Bhd v. JB Properties Sdn Bhd (SK Brothers Realty, Third Party)* [1998] 7 MLJ 182 HC.

Contention For Plaintiff

For the plaintiff, Cik Dheema Ariyapala and En. Adrin Adzuan Mohd Daud contended that the plaintiff has incurred the bank interest for extension of time as a foreseeable loss. They added that the payment of that interest by a third party, Purcon, does not mean that the plaintiff could not make a claim as the plaintiff has to bear the debt due to Purcon.

In respect of the company interest, it was submitted that the plaintiff had to obtain the loan of RM700,000 from Purcon towards the settlement of the purchase price, and that it was not a moneylending transaction, relying on *Ngui Mui Khin & Anor. v. Gillespie Bros. & Co. Ltd.* [1980] 2 MLJ 9.

It was argued for the plaintiff that the defendant's refusal to withdraw the caveats had resulted in the plaintiff having to instruct solicitors to remove the caveats and hence the claim for legal fees is justified.

Decision Of The Court

Authorities Cited For Defendant

At this juncture, I shall consider some of the authorities cited for the defendant. Section 322(2) provides for the nature and effect of a private caveat and does not have anything to do with the subject matter of the instant appeal pertaining to assessment of damages against the defendant who has wrongfully or without reasonable cause secured the entry of private caveats.

In *Owners of Dredger Liesbosch, supra,* the assessment of damages was in respect of the issues completely unconnected with the provisions of s. 329(1) and so is obviously unhelpful to the defendant herein.

Section 329(1)

Section 329(1), which has been cited for both the defendant and the plaintiff, regulates the compensation for wrongful caveats in the following words:

> (1) Any person or body who, wrongfully or without reasonable cause, secures the entry of, or fails to withdraw, any private caveat shall be liable to pay compensation to any person or body who thereby suffers any damage or loss.

In my view, under s. 329(1), the burden of proof is cast on the person claiming compensation to establish the following facts:

(a) a private caveat has been entered;

(b) wrongfully or without reasonable cause; and

(c) damage or loss has been suffered thereby.

Items (a) and (b) are non-issues in the appeal before me as they have already been established when the caveats in question were ordered to be removed by the learned judge. Only item (c) remains to be decided by me in this appeal.

Section 329(1) came up for consideration in *Mawar Biru, supra*, before James Foong JC (now J). The caveat entered by the plaintiff there was ordered to be removed, with damages to be assessed. At the hearing of the assessment of damages, the defendant claimed loss of interest on the balance of the purchase price, which was dismissed by the learned judge who held, *inter alia*, that:

(a) the burden is on the defendant to prove real and actual loss; and

(b) the usual approach to damages in these type of cases is by determining whether there is a property value loss in that there is a decrease in the price of the property after the same is offered for sale subsequent to the caveat being removed and there was no such evidence.

In *Coke & Coal, supra*, the fourth defendant was a director of a company which was the registered proprietor of the lands in question. The receivers and managers of the company as vendors entered into a sale and purchase agreement with the plaintiff as purchaser of the lands. The fourth defendant, among others, caused a caveat to be lodged against the lands. The court removed the caveat and the learned registrar assessed damages at RM205,600. In setting aside the learned registrar's decision, Chin Fook Yen J (as he then was) held that the award for damages was not for property value loss as there was no sale involved, but was for interest that would have accrued on the loan from a bank to use as working capital to carry on the plaintiff's business. The learned judge who was called upon to determine whether there was evidence of damage suffered by the plaintiff thereby held that the plaintiff has not shown either that he has incurred a loss of his own money or that he has lost the use of his own money.

The plaintiff's claim against the defendant in *Minty Holdings, supra*, for general damages to be assessed as a result of wrongful entry of two caveats lodged by the defendant on the plaintiff's property pursuant to an application under O. 14 of the Rules of the High Court 1980 was dismissed by the learned registrar. On appeal to the judge in chambers, judgment was entered and damages were ordered to be assessed. The learned registrar in the subsequent assessment of damages awarded interest at 8% p.a. on the 90% of the balance purchase price and the legal fees of RM41,801.80. On appeal by the defendant, the issue was whether the plaintiff suffered such loss or damage as a result of the wrongful lodgment of the caveat by the defendant. Kamalanathan Ratnam J held that the plaintiff has totally failed to prove any actual loss or real

damage; and that the legal fees being quantifiable were special damages but the order related to general damages and so the plaintiff had no right to make a claim for ascertained legal fees.

In *Lo Foi v. Lee Ah Hong & Ors* [1998] 1 CLJ Supp 244, HC, which was cited for the plaintiff, upon the removal of the caveat lodged by the plaintiff therein, the defendants claimed that the caveat had thwarted their proposed development on the property and applied for compensation under s. 329(1), claiming RM3.75 million for loss of profits and RM2.7 million for loss of rentals, all of which were disallowed by the learned registrar except for RM2,000 fee which the defendants have incurred to get the caveat removed. On appeal, Abdul Malik Ishak J held that damages under s. 329(1) must be assessed in accordance with the principles of the law of torts and that would be the reasonable foreseeability test. Hence, the damages would be recoverable if they come within the range of damages recoverable in law, and if they are not too remote. Since the defendants have failed to prove their claims, the defendants' appeal was dismissed.

In *Quill Construction Sdn Bhd v. Tan Hor Teng & Anor* [2003] 7 CLJ 24 HC, the defendant has appealed against the decision of the learned registrar who has allowed the plaintiff's claim for RM222,548.46 being losses incurred by the plaintiff as a result of the private caveat wrongfully lodged by the defendant on the plaintiff's property. Abdul Malik Ishak J, in dismissing the appeal, held that the loss incurred would cover expenses which the plaintiff had incurred in seeking to remove the private caveat under s. 327, and also the additional losses incurred by the plaintiff arising from the delay in the completion of the sale and purchase agreement, as itemised at RM222,548.46.

So far as I am aware, our Federal Court and Court of Appeal have had no opportunity to consider the purview and ambit of s. 329(1) in relation to assessment of damages.

In my judgment, for the purpose of assessing "compensation to any person or body who thereby suffers any damage or loss" under s. 329(1), on the basis of the aforesaid High Court judgments, the following principles may be culled:

(a) The assessment of compensation under s. 329(1) must be undertaken on the facts and circumstances established by way of the evidence adduced before the assessor having regard to the terms of the order for such assessment;

(b) The burden is on the claimant to prove real and actual loss: *Cheng Chin Chong v. Shak Heng & Sons Sdn. Bhd.* [1981] CLJ 91; [1981] CLJ (Rep) 126; *Mawar Biru, supra, Coke & Coal, supra, Minty Holdings, supra; Lo Foi, supra;* and *Quill Construction, supra.*

(c) The usual approach is by determining in the first instance, whether there is a property value loss in that there is a decrease in the price of the said property after the same is offered for sale subsequent to the caveat being removed: *Mawar Biru, supra; Coke & Coal, supra*. However, in my view, this is not the only approach.

(d) The claimant must prove loss of his own money or loss of use of his own money: *Coke & Coal, supra.*

(e) Damages must be assessed in accordance with the principles of the law of torts by reference to the reasonable foreseeability test ie, reasonable in law and not too remote: *Lo Foi, supra.*

(f) Compensation would include any fee and expenses incurred to get the caveat removed: *Lo Foi, supra; Quill Construction, supra.*

(g) The claimant has the duty to mitigate his loss: *Coke & Coal, supra; Lo Foi, supra;* and *Quill Construction, supra.*

Is The Learned Registrar's Assessment Correct?

The sole question before me is:

> In the light of the terms of the Judge's order as alluded to above, is the learned registrar correct in awarding the aforesaid heads of damages?

(1) Bank Interest

In respect of the bank interest, it is to be noted that there is evidence showing that the plaintiff had purchased the property in a public auction on 9 December 1998, and on 10 December 1998, the defendant had lodged the private caveats. Consequently, the sale of the property could not be completed and hence it could not be registered in the name of the plaintiff until 13 March 2000. The completion date should have been 8 March 1999. The plaintiff had to obtain and did obtain from the court an extension of time to overcome this difficulty and also to avoid the forfeiture of RM98,000 which the plaintiff has paid as deposit for the purchase. With the extension of time granted by the court, the plaintiff had to pay the bank interest. The question of the plaintiff's impecuniosity is completely non-existent as the whole situation was brought about by the defendant's private caveats. In fact, there was evidence that the bank interest has been

reduced after taking into account a refund of RM1,691.48 as the plaintiff was able to settle the balance purchase price by 1 June 1999 instead of 8 June 1999. This obviously constituted a mitigation of loss by the plaintiff.

While it is true that the bank interest has been paid by Purcon on behalf of the plaintiff, it does not alter the fact that the plaintiff eventually has to repay the sum of RM22,050 to Purcon.

(2) Company Interest

The next head of damages by way of company interest is supported by the evidence that the defendant's wrongful entry of the private caveats had resulted in the plaintiff having to take a loan of RM700,000 from Purcon in order to complete the payment of the purchase price for the property. The interest is based on the rate of 8% p.a.

On the defendant's contention that the loan is a moneylending transaction under s. 3 of the Moneylenders Act 1951 and hence unenforceable under s. 15 thereof, it is necessary for me to look at s. 2 of this Act which defines a moneylender as including every person whose business is that of moneylending or who carries on or advertises himself or holds himself out in any way as carrying on that business whether or not that person also possesses or earns property or money derived from sources other than the lending of money and whether or not that person carries on the business as a principal or as an agent.

Whether or not Purcon carries on the business of a moneylender is a question of fact.

In *Baju Ria v. Liau Kim Lian* [1965] 31 MLJ 128, at p. 130 Thompson CJ (as he then was) said that "carrying on" involves some sort of continuing conduct ie, more than occasional or disconnected loans, and that each case must depend on its own peculiar features and a question of degree. The charging of interest on money lent does not on its own make one a moneylender, although it raises the presumption under s. 3 of the Act: *Yeep Mooi v. Chu Chin Chua & Ors.* [1981] 1 MLJ 14 FC; *Larut Matang Supermarket Sdn Bhd v. Liew Fook Yung* [1995] 1 MLJ 375.

Section 3 of the Act provides as follows:

> Save as excepted in section 2A(1) and (2), any person who lends a sum of money in consideration of a larger sum being repaid shall be presumed until the contrary is proved to be a moneylender.

Who then should invoke the presumption under s. 3 of this Act? The answer is plain and obvious ie, the person on whom the interest was imposed.

The defendant who is a stranger to the loan is making an issue over a contractual transaction to which he is not privy. In my judgment, the complete absence of a privity of contract means that the defendant is in no position to be clothed with any *locus standi* so as to entitle him to raise this issue.

The instant appeal does not revolve around a claim by the loaner Purcon against the loanee, the plaintiff, for the repayment of the loan and the interest. The issue of moneylending transaction is a non-issue at all.

Even assuming for a moment that it is an issue, in my view, the one-off loan given by Purcon to the plaintiff at an interest at 8% p.a. does not *per se* make the transaction a moneylending transaction. The plaintiff who is the loanee is not raising this issue at all. It is my specific finding that it is not a moneylending transaction.

Be that as it may, it is significant to note that Purcon is not a company having for its primary object the lending of money and so the Moneylending Act 1951 does not apply, as is evident from the following words in s. 2A(1)(h) which reads:

(1) This Act shall not apply to:

...

(h) any person *bona fide* carrying on any business not having for its primary object the lending of money in the course of which and for the purposes whereof he lends money.

(3) Legal Fees

The final item raised by the defendant pertaining to legal fees has already been resolved in *Lo Foi, supra*, where RM2,000 fee incurred to get the caveat removed was allowed by the learned registrar and it was not disturbed by the learned judge.

Further in *Quill Construction*, Abdul Malik Ishak J held, *inter alia*, that the compensation would also cover expenses incurred in seeking the removal of the private caveat.

Payment Made By Purcon

Notwithstanding the fact that the damage or loss has been paid by Purcon on behalf of the plaintiff, it is in my view the payment of the plaintiff through Purcon. The maxim *qui facit per alium facit per se* (he who does an act through another is deemed in law to do it himself) applies here.

Illustrations of the application of this maxim abound in the cases which came up for consideration and determination by our courts.

In *Dan Sin Wah v. Chan Hai Swee* [1951] 17 MLJ 189 at p. 193, Briggs J held that the execution of a document by a donee of a power of attorney granted pursuant to the Powers of Attorney Ordinance 1949 was an execution by the donor.

An insurance agent who was authorized to fill in and sign a proposal form was held to have done so on behalf of the policy holder, as the legal relationship of principal and agent was created in respect of the proposal form to effect the insurance in question: per Hashim Yeop A Sani J (later CJ (Malaya) in *Ong Eng Chai v. China Insurance Co Ltd* [1974] 1 MLJ 82.

The maxim is an expression of the principle governing vicarious liability: per Raja Azlan Shah FJ (now HRH the Sultan of Perak) in *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1975] 1 MLJ 119 (FC). There a car owner was held liable because he has authorized or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. This Federal Court decision was followed by the Court of Appeal in *Adnan bin Hj Mat Jidin & Anor v. Irwan Wee bin Abdullah & Anor* [1997] 3 CLJ 181.

The Federal Court in *Jayasankaran v. Public Prosecutor* [1983] 1 CLJ 171; [1983] CLJ (Rep) 182 held that a petition of appeal filed and signed by the solicitor in respect of an appeal against conviction under s. 307(iv) of the Criminal Procedure Code was held to have complied with the relevant portion of s. 307(iv) which reads: 'the appellant shall lodge … a petition of appeal ...' Although s. 307(iv) provides only for the appellant to file the petition of appeal and made no reference at all to the filing by the solicitor, the Federal Court held that the law does not provide for the appellant to do so 'personally' or 'in person'. Therefore, the solicitor filing and signing the petition of appeal would suffice as it attracts the maxim *qui facit per alium facit per se*. See also my judgment in *The Owners of The Ship or Vessel Mt '"Rowan" v. The Owners of The Ship or Vessel or Property 'Singapura Timur* [2003] 2 CLJ 736.

Conclusion

The plaintiff has discharged the burden of proving real and actual loss in the aforesaid heads of damages, being losses of his own money which are reasonably foreseeable and direct consequences of the private caveats lodged by the defendant. The plaintiff has also mitigated his loss by reducing the bank interest.

Hence, I hold that the learned registrar is correct in his assessment of damages under s. 329(1) which I hereby affirm. That being the case, I dismiss this appeal with costs.